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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT COURT OF CALIFORNIA

LOWELL LABERTEW, an individual; and SANDRA LABERTEW, an individual, Plaintiff, v. C&R FINANCIAL, INC., an entity of unknown form; GOLDEN EMPIRE MORTGAGE, INC., dba CIB FUNDING, a California Corporation; RAYMOND JACOB ROSZKOWICZ, an individual; RICK WILKES, an individual; BEVERLEE WILKES, an individual; and DOES 1-10, inclusive, Defendants,	Case No. 07cv2092W (LSP) Action Date: Trail Date: None Set **BEVERLEE WILKES AND RICK WILKES ANSWER TO PLAINTIFF'S COMPLAINT**

COMES NOW RICK WILKES and BEVERLEE WILKES (hereinafter collectively referred to "Defendant") in answer to the First Amended Complaint filed by LOWELL LABERTEW and SANDRA LABERTEW (hereinafter referred to as "Plaintiff"), on its' own behalf and on behalf of all persons similarly situated, and allege as follows:

1. Defendant generally denies all the allegations in the First Amended Complaint except the following items which are specifically admitted:

a. Defendant admits that jurisdiction is properly conferred upon this Court.

b. Defendant admits that Rick and Beverlee Wilkes are individuals doing business in the State of California.

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c. Defendant admits Plaintiff entered into a transaction in the amount of $45,015.91 on or about November 9, 2006, secured by a second deed of trust on Plaintiff's residence.

FIRST AFFIRMATIVE DEFENSE

(Failure to State Facts Sufficient)

2. Defendant is informed and believes, and thereon alleges, that the Complaint fails to state facts certain and/or sufficient to constitute a cause of action against this answering defendant.

SECOND AFFIRMATIVE DEFENSE

(Contributory Negligence)

3. Defendant is informed and believes, and thereon alleges, that plaintiff's alleged damages, if any, were wholly or partly contributed to or proximately caused by plaintiff's conduct and activities, including plaintiff's negligence and carelessness in the maintenance, control, utilization and repair of its property. Defendant is entitled to an equitable apportionment of the damages in relation to the negligence or wrongdoing of the plaintiff.

THIRD AFFIRMATIVE DEFENSE

(Comparative Fault of Others)

4. Defendant is informed and believes, and thereon alleges, and upon such information and belief alleges, that the matters complained of in the Complaint were caused, in whole or in part, by the acts or omissions of third parties other than this answering defendant, and that any liability found against this answering defendant must be reduced by the percentage of fault found to apply to said third parties.

FOURTH AFFIRMATIVE DEFENSE

(Intervening and Superseding Causes)

5. Defendant is informed and believes, and thereon alleges, that if plaintiff was injured or suffered any loss, which defendant denies, that any such injury and/or loss was the proximate cause of the intervening and superseding actions on the part of plaintiff or other parties other than this answering defendant and that, by virtue of the intervening and superseding fault, any recovery against this answering defendant must be reduced in percentage to the amount of

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said fault.

FIFTH AFFIRMATIVE DEFENSE

(Estoppel)

6. Defendant is informed and believes, and thereon alleges, that plaintiff, by its' own conduct, is equitably estopped from asserting any right to recovery as against this answering defendant.

SIXTH AFFIRMATIVE DEFENSE

(Statutes of Limitations)

7. Defendant is informed and believes, and thereon alleges, that the Complaint, and each and every purported cause of action contained therein, is barred, either wholly or in part, by the statute of limitations set forth in the California Code of Civil Procedure including, but not limited to, Sections 337, 337.1, 337.15, 338, 339, 340, 342 and 343.

SEVENTH AFFIRMATIVE DEFENSE

(Failure to Mitigate Damages)

8. Defendant is informed and believes, and thereon alleges, that if plaintiff suffered a loss or damage, which this answering defendant denies, then plaintiff failed to exercise reasonable care and diligence to avoid that loss, if any, or minimize the resulting damage, if any, and cannot recover for said loss or damage beyond that which would have resulted from a reasonable mitigation.

EIGHTH AFFIRMATIVE DEFENSE

(Warranty Limitation)

9. Defendant is informed and believes, and thereon alleges, that if it is found that this answering defendant made a warranty, express or implied, which this answering defendant denies, then such warranty, if any, was disclaimed, excluded and limited in all of its parts and in its entirety, explicitly and conspicuously, both orally and in writing, in words that plainly conveyed the meaning to the plaintiff of such disclaimed exclusion and limitation and that such warranty, if any, was also excluded and modified by the course of dealing and usage of the trade, all as to preclude plaintiff from reliance upon or recovery from said warranty.

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NINTH AFFIRMATIVE DEFENSE

(Lack of Capacity and/or Standing to Sue)

10. Defendant is informed and believes, and thereon alleges, that plaintiff lacks the capacity and/or standing to sue which bars the Complaint.

TENTH AFFIRMATIVE DEFENSE

(Lack of Privity)

11. Defendant is informed and believes, and thereon alleges, that plaintiffs' lack of privity with defendant bars the Complaint including, but not limited to, any alleged warranty claims by plaintiff which do not apply in the context of the present litigation.

ELEVENTH AFFIRMATIVE DEFENSE

(Acts of God)

12. Defendant is informed and believes, and thereon alleges, that any and all events, happenings, injuries or damages, if any, alleged in the Complaint were a direct result of an Act of God.

TWELFTH AFFIRMATIVE DEFENSE

(Misuse of Products)

13. Defendant is informed and believes, and thereon alleges, that any and all events, occurrences, injuries and damages, if any, as alleged by the plaintiff were proximately caused or contributed to by the products in question having been used in a non-intended or abnormal manner, and not as a result of any defects in, or failure of, said products or any of their component parts.

THIRTEENTH AFFIRMATIVE DEFENSE

(Waiver)

14. Defendant is informed and believes, and thereon alleges, that plaintiff has engaged in conduct and activities sufficient to constitute a waiver of any alleged breach of contract, negligence, or any other conduct, if any, as set forth in the Complaint.

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FOURTEENTH AFFIRMATIVE DEFENSE

(Assumption of the Risk)

15. Defendant is informed and believes, and thereon alleges, that plaintiff expressly, voluntarily and knowingly assumed all risks about which it complains in its Complaint, and is therefore, barred either totally or to the extent of said assumption from recovery of any damages.

FIFTEENTH AFFIRMATIVE DEFENSE

(Laches)

16. Defendant is informed and believes, and thereon alleges, that each and every one of plaintiff's causes of action are barred by the doctrine of laches.

SIXTEENTH AFFIRMATIVE DEFENSE

(Untimely Notice)

17. Defendant is informed and believes, and thereon alleges, that plaintiff has failed to give timely and proper notice to defendant which therefore bars the Complaint.

SEVENTEENTH AFFIRMATIVE DEFENSE

(Collateral Estoppel and Res judicata)

18. Defendant is informed and believes, and thereon alleges, that the Complaint and each and every purported cause of action contained therein is barred either wholly or in part by the doctrines of collateral estoppel and res judicata.

EIGHTEENTH AFFIRMATIVE DEFENSE

(Unclean Hands)

19. Defendant is informed and believes, and thereon alleges, that the doctrine of unclean hands bars the Complaint.

NINETEENTH AFFIRMATIVE DEFENSE

(Consent)

20. Defendant is informed and believes, and thereon alleges, that the conduct of defendant was with plaintiff's consent which bars the Complaint.

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TWENTIETH AFFIRMATIVE DEFENSE

(State of the Art)

21. Defendant is informed and believes, and thereon alleges that the product was "state of the art" and/or constructed with "state of the art" technology at the time it was manufactured and not defective in any legally actionable respect.

TWENTY-FIRST AFFIRMATIVE DEFENSE

(Civil Code § 1430-1442)

22. Defendant is informed and believes, and thereon alleges, that plaintiff is barred by the provisions of Civil Code § 1430-1442.

TWENTY-SECOND AFFIRMATIVE DEFENSE

(Civil Code § 1375)

23. Defendant is informed and believes, and thereon alleges, that plaintiff's Complaint is barred and is procedurally deficient as not being in compliance with Civil Code § 1375.

TWENTY-THIRD AFFIRMATIVE DEFENSE

(Plaintiff's Active Negligence)

24. Defendant is informed and believes, and thereon alleges, that the Complaint, and each and every cause of action therein, is barred by the active negligence of the plaintiff as compared to the passive actions of defendant.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

(Full Disclosure)

25. Defendant is informed and believes, and thereon alleges, that it disclosed all relevant information pertaining to the subject property to the plaintiff.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

(Civil Code §3343)

26. Defendant is informed and believes, and thereon alleges, that plaintiff is limited by, barred by and/or subject to the provisions of Civil Code §3343.

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TWENTY-SIXTH AFFIRMATIVE DEFENSE

(Lack of Consideration)

27. This answering defendant is informed and believes and on that basis alleges that plaintiff's Complaint and separate causes of action therein are barred for lack of consideration.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

(Release)

28. This answering defendant is informed and believes that plaintiff has released this answering defendant from liability associated with damages arising from various claims asserted in plaintiff's Complaint.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

(No Breach of Warranties)

29. This answering defendant is informed and believes and based thereon alleges that it did not breach any warranties, express or implied, and that no warranties, express or implied, arose in the instant situation.

TWENTY-NINTH AFFIRMATIVE DEFENSE

(Standard of Care)

30. This answering defendant alleges that plaintiff is barred and precluded from any recovery in this action because this answering defendant at all times complied with the applicable standard of care required of this answering defendant, at the time and location where the services were rendered.

THIRTIETH AFFIRMATIVE DEFENSE

(Failure to Notify)

31. This answering defendant is informed and believes and based thereon alleges, that if any defects or inadequacies in the work performed by this answering defendant, which this defendant denies, plaintiff failed to timely notify this defendant of such condition and failed to give this defendant timely opportunity to cure such conditions. Furthermore, this answering defendant is informed and believes and on that basis alleges, that at no time prior to the filing of this action, neither plaintiff or any agent, representative or employee(s) thereof, notified this

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defendant of any breach of any contract, warranty or duty to plaintiff. By reason of said failure to notify, plaintiff is barred from any alleged right of recovery from this answering defendant. This conduct by plaintiff bars it from any relief from this answering defendant herein.

THIRTY-FIRST AFFIRMATIVE DEFENSE

(Ambiguity)

32. This answering defendant is informed and believes, and thereon alleges that the terms of the alleged agreement are ambiguous. Plaintiff knew, or had a reason to know, that the terms were ambiguous, but failed to disclose this fact to this answering defendant.

THIRTY-SECOND AFFIRMATIVE DEFENSE

(Unconscionable)

33. This answering defendant is informed and believes, and thereon alleges that the agreements alleged in plaintiff's Complaint are unconscionable, thereby rendering them invalid and unenforceable.

THIRTY-THIRD AFFIRMATIVE DEFENSE

(No Privity of Contract)

34. This answering defendant is informed and believes, and thereon alleges that, at all times mentioned in the Complaint herein, plaintiff and this answering defendant were not in privity of contract.

THIRTY-FOURTH AFFIRMATIVE DEFENSE

(Good Faith)

35. This answering defendant is informed and believes, and thereon alleges that at all times mentioned herein, this answering defendant acted reasonably and in good faith with regard to the acts and transactions which are the subject of plaintiff's Complaint.

THIRTY-FIFTH AFFIRMATIVE DEFENSE

(Outside Scope of Agency)

36. That any wrongful acts, as alleged by plaintiff on the part of other defendants were not performed within the course and scope of any agency or relationship with this answering defendant and were not ratified by this answering defendant.

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THIRTY-SIXTH AFFIRMATIVE DEFENSE

(Misuse of Products)

37. This answering defendant is informed and believes, and thereon alleges, that any and all events, occurrences, injuries and damages, if any, as alleged by the plaintiff were proximately caused or contributed to by the products in questions having been used in a non-intended or abnormal manner, and not as a result of any defects in, or failure of, said products or any of their component parts.

THIRTY-SEVENTH AFFIRMATIVE DEFENSE

(No Attorneys' Fees)

38. That plaintiff has failed to allege any basis which would entitle plaintiff to reimbursement of attorney's fees allegedly incurred in this litigation. No such basis exists, no contract for attorneys' fees exists between plaintiff and defendant exists, and plaintiff is not entitled to reimbursement.

THIRTY-EIGHTH AFFIRMATIVE DEFENSE

(Costs)

39. This answering defendant is informed and believes and thereon alleges that the Complaint was brought without reasonable cause and without a good faith belief that there was a justifiable controversy under the facts or the law which warranted the filing of the Complaint against this answering defendant. Plaintiff should therefore be responsible for all defendant's necessary and reasonable defense costs, as more particularly set forth in the California Code of Civil Procedure Section 128.5.

THIRTY-NINTH AFFIRMATIVE DEFENSE

(Conduct Was Justified)

40. The conduct of this answering defendant in regard to the matters alleged in the Complaint were justified, and by reason of the foregoing, plaintiff is barred from any recovery against defendant herein.

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FORTIETH AFFIRMATIVE DEFENSE

(Complete Performance)

41. This answering defendant has appropriately, completely and fully performed and discharged any and all obligations and legal duties arising out of the matters alleged in the Complaint.

FORTY-FIRST AFFIRMATIVE DEFENSE

(Reservation)

42. Defendant presently has insufficient knowledge or information on which to form a belief as to whether it may have additional, as yet unstated affirmative defense available. Defendant reserves herein the right to assert additional defenses in the event that the discovery indicates that they would be appropriate.

FORTY-SECOND AFFIRMATIVE DEFENSE

(Incorporation of Affirmative Defenses)

43. This answering defendant incorporates herein by this reference as though fully set forth herein each and every one of the affirmative defenses asserted in answers on file to the Complaint filed herein.

FORTY-THIRD AFFIRMATIVE DEFENSE

(Attorneys' Fees)

44. If it is determined that a contract exists between plaintiff and defendant entitling one to attorneys' fees, defendant is entitled to reimbursement for attorneys' fees and costs incurred by defendant in this litigation pursuant to said agreement entered into between defendant and plaintiff.

FORTY-FOURTH AFFIRMATIVE DEFENSE

(No Agency Relationship)

45. That at all times mentioned in the Complaint herein, no agency, servant or employee relationship existed between this answering defendant and the remaining defendants or cross-defendants.

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FORTY-FIFTH AFFIRMATIVE DEFENSE

(Excused Obligations)

46. As and for a separate and forty-fifth affirmative defense, defendant alleges that, to the extent that plaintiff's Complaint is based upon a cause of action for breach of contract or agreement by defendant, defendant's performance is excused and plaintiff's recovery is barred, by the doctrines of failure of consideration, impossibility of performance, frustration of purpose, interference with performance, unconscionability, adhesion, fraud, duress and/or breach of condition.

FORTY-SIXTH AFFIRMATIVE DEFENSE

(Lack of Maintenance)

47. As and for a separate and forty-sixth affirmative defense, defendant alleges that plaintiff and/or other third parties failed to perform that degree of maintenance on the work of improvement installed by this answering defendant as was necessary to protect such work of improvement from deterioration from the elements, wear and tear, and/or other factors, thus barring or otherwise diminishing the amount of recovery, if any, as against this answering defendant.

FORTY-SEVENTH AFFIRMATIVE DEFENSE

(Acceptance)

48. As and for a separate and forty-seventh affirmative defense, defendant alleges that plaintiff herein accepted and approved the work, acts and/or omissions, if any, of this answering defendant.

FORTY-EIGHTH AFFIRMATIVE DEFENSE

(Ratification)

49. As and for a separate and forty-eight affirmative defense, defendant alleges that plaintiff ratified all acts and/or omissions, if any, of this answering defendant, thereby barring plaintiff from any recovery as against this answering defendant.

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FORTY-NINTH AFFIRMATIVE DEFENSE

(Spoilation)

50. As and for a separate and forty-ninth affirmative defense, defendant alleges that plaintiff, plaintiff's agents, contractors, and/or other third parties have intentionally and/or negligently permitted spoilation of evidence integrally necessary to properly and thoroughly litigate this action, thereby resulting in irreparable injury and prejudice to this answering defendant's ability to defend itself in this matter, and thus estopping plaintiff's claim as against this answering defendant.

FIFTIETH AFFIRMATIVE DEFENSE

(Indispensable Parties)

51. As and for a separate and fiftieth affirmative defense, defendant alleges that the purported claims and causes of action contained in the Complaint require for their full, final and complete resolution and adjudication, in the presence of additional necessary and/or indispensable parties that are not participating in this action, thereby prejudicing this answering defendant such that any recovery by plaintiff as against this answering defendant should be barred or diminished.

FIFTY-FIRST AFFIRMATIVE DEFENSE

(Misjoinder)

52. This answering Defendant is informed and believes, and thereon alleges, that the Complaint on file herein, and the whole thereof, including each and every purported cause of action contained therein, is in violation of California Code of Civil Procedure §378 and the law of joinder and therefore contains a misjoinder of plaintiff.

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FIFTY-SECOND AFFIRMATIVE DEFENSE

(No Right Of Rescission)

53. This answering Defendant is informed and believes, and thereon alleges, that the Plaintiffs have no right to rescind the loan pursuant to 15 U.S.C. §1635.

DATED: March 7, 2008

Geraci Law Firm, APC

Christina L. Geraci,
Anthony F. Geraci
Attorneys for Defendant, BEVERLEE WILKES and RICK WILKES